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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COUNTY OF SAN DIEGO,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS  
BOARD et al.,

Respondents.

D044213

(WCAB No. SD0 0254223)

Petition for writ of review. A. John Shimmon, Judge. Affirmed.

By way of a petition for a writ of review, the County of San Diego (the county) challenges a Workers' Compensation Appeals Board (WCAB) decision denying reconsideration of an order increasing respondent Mary Rojas-Melzer's disability award. The county contends Rojas-Melzer's request for an increased award was untimely and the WCAB therefore acted without jurisdiction in granting the request. In addition, the county contends there is no substantial evidence to support Rojas-Melzer's contention she is totally and permanently disabled.

We reject the county's contentions and affirm the WCAB's decision. Although Rojas-Melzer made no formal request for an increased award within five years of her injury, the county had notice of her claim well before the expiration of the five-year statute of limitations and was not prejudiced by her pursuit of additional benefits. Moreover, her claim to be permanently and totally disabled is fully supported by the opinion of a medical expert.

## FACTUAL BACKGROUND

### 1. *1998-2000: Injury and Initial Award*

Rojas-Melzer worked as a supervising assessment clerk for the county. Part of her duties included setting up chairs for conferences and setting up training sites. On February 6, 1998, during the course of her employment, Rojas-Melzer suffered an injury to her back.

Rojas-Melzer was treated by Dr. Sidney Levine. As part of her treatment, she underwent five surgeries. With the assistance of counsel, Rojas-Melzer prosecuted a workers' compensation claim. In response to the claim, the county stipulated that Rojas-Melzer had suffered a permanent disability of 52 percent, and the stipulation was approved by the WCAB on April 14, 2000.

### 2. *2001-2002: Total Disability Dispute*

On September 18, 2001, Dr. Levine found Rojas-Melzer's condition to be permanent and stationary, stating: "The patient is no longer capable of carrying out the full and regular duties of her former occupation and should be considered a Medically

Qualified Injured Worker and retrained for some type of employment compatible with her level of disability."

Rojas-Melzer attempted vocational rehabilitation without success. On December 3, 2001, the vocational rehabilitation center issued a closure report, stating: "Ms. Rojas-Melzer will not benefit from additional vocational rehabilitation services at this time."

On May 11, 2002, based on an examination, medical history and a two-day work function capacity evaluation,<sup>1</sup> Dr. Levine stated: "[I]n my opinion, the patient is no longer capable of competing in the open labor market. Therefore, in my opinion, she is permanently and totally disabled."

Dr. Levine's finding of 100 percent disability was served on the county on May 22, 2002, with a request to settle the case with stipulations of permanent and total disability. The request from Rojas-Melzer's counsel further stated: "Please let me know your position within the next fifteen days otherwise I will have to proceed with the filing of a DOR."<sup>2</sup>

In response to Dr. Levine's findings and the request for stipulations of permanent and total disability, the county had Rojas-Melzer examined by its own expert. On August 7, 2002, after examination and review of Rojas-Melzer's medical history, including Dr. Levine's report, Dr. William Davidson, the expert retained by the county, stated: "[S]he is not totally disabled. [¶]A semi-sedentary disability appears more consistent with her

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<sup>1</sup> The two-day screening was done by Sharp Occupational Performance Center and stated: "Ms. Rojas-Melzer does not currently have the capacity to work on a full time or part time basis."

ability. . . . Certainly, she could perform clerical work, telephone operating work, receptionist work and the like. [¶][T]he tears that the patient shed in my office, in contrast to the smiles she exhibited while walking about in the community in May of 2002, suggested a certain amount of symptom magnification." Based on Dr. Davidson's report on October 14, 2002, the county offered to increase the previous disability rating of 52 percent to 56 percent.

On November 21, 2002, after reviewing Dr. Davidson's report, Dr. Levine stated: "Having reviewed the above-described medical records and the surveillance video, my opinion [100% disability] remains as previously stated."

On December 18, 2002, Rojas-Melzer filed a DOR and attached Dr. Levine's finding of 100 percent disability. On February 6, 2003, the five-year anniversary date of the injury passed.

### *3. 2003: WCAB Finds Total Disability*

At a May 1, 2003, settlement conference, the county argued Rojas-Melzer's claim was time barred because she did not file a formal petition to reopen within five years from the date of injury. Initially, the WCAB ruled in favor of the county and found the "claim for new and further disability is barred by Labor Code section 5804. [¶]It is hereby ordered that the Applicant's request for an award of new and further disability be denied." In its opinion, the WCAB stated: "[T]he filing of the Declaration of Readiness

is not sufficient to constitute a petition to reopen so the Workers' Compensation Appeals Board does not have jurisdiction to award the Applicant new and further disability."

After Rojas-Melzer filed a petition for reconsideration, the WCAB vacated its order and awarded respondent 100 percent disability.

The county then filed a petition for reconsideration. On February 2, 2004, a workers' compensation judge (WCJ) recommended "the Defendant's Petition for Reconsideration should be denied." On March 16, 2004, the WCAB denied reconsideration, citing the contents of the WCJ's recommendation. The county then filed a petition for writ of review in this court. We issued the writ of review.

## DISCUSSION

### I

#### *Extension of WCAB Jurisdiction*

The county contends the WCAB lacked jurisdiction to reopen the case and award additional disability. As we noted at the outset, we disagree.

##### *A. Standard of Review*

The facts of this case are not in dispute, therefore application of the statute and case law to established facts is a matter of law subject to de novo review. (*Granite Construction Co. v. Workers' Comp. Appeals Bd.* (2003) 112 Cal.App.4th 1453, 1457, citing *Martinez v. Workers' Comp. Appeals Bd.* (2000) 84 Cal.App.4th 1079, 1084.)

##### *B. Applicable Statutes*

Labor Code section 5410 provides in part: "Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of

compensation . . . within five years after the date of injury upon the ground that the original injury has caused new and further disability." (Lab. Code, § 5410.) A closely related statute, Labor Code section 5804, states in part: "No award of compensation shall be rescinded, altered, or amended after five years from the date of injury except upon a petition by a party in interest filed within such five years." (Lab. Code, § 5804.)

Where an insurer or other responsible party has been given timely notice of a claim for additional benefits and the insurer or other responsible party has not been prejudiced, the absence of a formal petition does not prevent the WCAB from making an additional award. (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (1973) 9 Cal.3d 848, 852 (*Zurich*).) In *Zurich* prior to the expiration of the five-year limitation period, the worker fully litigated a claim for additional benefits. Indeed, a workers' compensation referee made a finding in the worker's favor shortly before the period expired. However, the worker had made no formal petition for additional benefits. The court nonetheless upheld a WCAB order which, after the five-year period set forth in sections 5410 and 5804 had expired, increased the award.

In explaining its holding, the court in *Zurich* stated: "Admittedly, no petition for the increased awards was filed by a 'party in interest.' The referee's notice, however, which was filed on December 7, 1970, well within the five-year period, specified not only the ground for relief, but the relief to be considered; and the absence of a petition by the applicant cannot in any way have prejudiced petitioner. The applicant, on the other hand, could reasonably have been lulled by the referee's action into thinking that there

was no necessity for him to file a petition; and the time for him to have filed would not have expired until March 1, 1971, in one case and June 14, 1971, in the other.

"In *Subsequent Injuries Fund v. Workmen's Comp. App. Bd.*, 2 Cal.3d 56, 65, this court reiterated the doctrine that limitation provisions in the Labor Code must be liberally construed in favor of employees unless otherwise compelled by the language of the statute. [Citations.] Applying such doctrine, the Court of Appeal recently held that a letter written by a doctor at an employee's request, stating that an award was insufficient in view of the injury, could be regarded as the institution of proceedings by a party in interest under section 5410 or as a 'petition by a party in interest' within the meaning of section 5804. [Citation.] An analogous situation exists here.

"Under the circumstances, the referee's notice should be treated as a petition to reopen under the provisions of the Labor Code hereinabove referred to. As a result, the board had the power to amend the awards at the time it did so." (*Zurich, supra*, 9 Cal.3d at p. 852; see also *Bland v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 324, 332.)

The circumstances presented here are, in all material respects, identical to the circumstances considered in *Zurich*. Before the five-year period expired, Rojas-Melzer presented the county with evidence of total permanent disability, the county had her examined by its own expert, the county offered to raise her disability rating, and Rojas-Melzer filed a DOR to which she attached Dr. Levine's report. Given these circumstances, the county was not prejudiced in any manner by Rojas-Melzer's failure to also file a formal petition to re-open. The record shows that the county knew before the five-year period expired that Rojas-Melzer believed she was entitled to an award based

on permanent and total disability and further that before the period expired, the county availed itself of the opportunity to fully investigate her claim. Under these circumstances, the DOR served as a petition to reopen. (See *Zurich, supra*, 9 Cal.3d at p. 852.)

Cases which have denied relief to late claimants are readily distinguishable. For example, when parties filed a petition more than nine years after an injury and made no intervening effort to obtain additional benefits, the court did not allow them relief from the provisions of Labor Code sections 5410 and 5804. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 300-302.) Similarly, where, more than five years after an injury, an employer discovered information which suggested the worker no longer needed all the benefits initially awarded, the employer was not allowed to decrease the award. (*Barnes v. WCAB* (2000) 23 Cal.4th 679, 690.) More recently, the court denied continued WCAB jurisdiction when an injured employee requested increased disabilities after the five-year period lapsed. (*Granite Construction Co. v. Workers' Comp. appeals Bd., supra*, 112 Cal.App.4th 1453.) "[T]he Board cannot require petitioners to defend a claim of further disability for which they did not receive notice until eight years after the injury." (*Id.* at p. 1462.)

As we have indicated, here, in contrast to the cases where WCAB jurisdiction was foreclosed by the passage of time, the county was fully apprised of Rojas-Melzer's claim before the five-year limitations period expired. Thus the WCAB had power to act on Rojas-Melzer's claim for additional benefits. (*Zurich, supra*, 9 Cal.3d at p. 852; *Bland v. Workmen's Comp. App. Bd., supra*, 3 Cal.3d at p. 332.)

## II

### *Sufficiency of Evidence*

The county also contends the WCAB lacked substantial evidence to find Rojas-Melzer was 100 percent totally and permanently disabled. Again, we disagree.

#### *A. Standard of Review*

In assessing whether substantial evidence exists, we view all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

#### *B. Discussion*

Substantial evidence is evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . . It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) In particular, "it is well established that the relevant and considered opinion of one physician may constitute substantial evidence in support of a factual determination of the WCAB." (*Id.* at p. 169, citing *LaVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 639.)

In this case there was not only a report by one doctor, there was a report by Sharp Occupational Performance Center, two reports by Dr. Levine, and a statement by the vocational rehabilitation training center, stating respondent could no longer participate in

the program due to her high level of disability. This is substantial evidence of 100 percent disability.

#### DISPOSITION

The WCAB's decision is affirmed.

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BENKE, Acting P. J.

WE CONCUR:

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HUFFMAN, J.

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McDONALD, J.